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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

HILLSBOROUGH DEVELOPMENT COMPANY, LLC, Plaintiff and Respondent, v. RICHARD J. ANNEN, Defendant and Appellant.	D074818 (Super. Ct. No. 37-2018-00037932-CU-MC-CTL)

APPEAL from an order of the Superior Court of San Diego County, Judith F. Hayes, Judge. Reversed.

Keehn Law Group, L. Scott Keehn; Annen Law Group and Richard J. Annen for Defendant and Appellant.

Law Office of Kurt W. Hallock and Kurt W. Hallock for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant Richard J. Annen appeals from an order of the trial court issuing a preliminary injunction enjoining Annen from acting as the manager of plaintiff

Hillsborough Development Company, LLC (Hillsborough), a limited liability company formed pursuant to the statutory framework authorizing the creation of such entities and governing their affairs, after the two majority shareholders voted to remove the former manager and install Annen as manager, instead.

At issue on appeal is whether Hillsborough met its burden of demonstrating that it is likely to succeed on the merits of its claims for injunctive and declaratory relief against Annen. Specifically, the parties dispute whether the two majority shareholders in Hillsborough have the authority to remove and replace Hillsborough's manager under the Hillsborough Operating Agreement and relevant provisions of the Corporations Code. The Operating Agreement itself does not address how the members may remove or replace Hillsborough's manager.

Annen contends that the consent of a *majority* of the members of Hillsborough is all that is required to remove and replace Hillsborough's manager.

According to Annen, because the Operating Agreement is silent with respect to how the manager may be removed, the default rule that is included among the Corporations Code's statutory provisions governing the formation, operation, and dissolution of limited liability companies—a rule that permits members to remove a manager through a vote of a majority in interest of the members—applies. Hillsborough, acting through Sparber, the manager whom Annen and another shareholder attempted to remove, contends that the consent of *all* of the members of Hillsborough, including the manager, is required to remove and replace that manager. Hillsborough maintains that a provision in the Hillsborough Operating Agreement that requires the unanimous consent

of all members for matters in which a vote is required applies, and that all of Hillsborough's members must therefore consent to the removal of Hillsborough's manager.

The trial court concluded that Hillsborough demonstrated a probability of prevailing, agreeing with Hillsborough that a general provision of the Operating Agreement that requires a unanimous vote of the members of Hillsborough in circumstances in which a vote of the members is required alters the statutory default rule that would otherwise require only the consent of a majority of the members, such that consent of all of the members is required to remove the manager. Having reached this conclusion, the court issued a preliminary injunction enjoining Annen from representing himself to be the properly elected manager of Hillsborough and from taking any actions as Hillsborough's purported manager.

We conclude that the Operating Agreement is ambiguous, and that the more reasonable interpretation of the relevant provision of the Operating Agreement is that it governs consent requirements only when the terms of the Operating Agreement, itself, require or authorize the members to vote on a particular matter. Because, at this stage of the proceedings, Hillsborough has not presented sufficient extrinsic evidence to support what we have determined to be the less reasonable interpretation of the voting provision in the Operating Agreement, we conclude that Hillsborough has not met its burden to demonstrate a probability of success on the merits sufficient to warrant the granting of a preliminary injunction.

We therefore conclude that the trial court erred in enjoining Annen from acting as Hillsborough's manager, and we reverse the trial court's order and remand to allow the case to proceed to trial.

II.

FACTUAL AND PROCEDURAL BACKGROUND

Hillsborough was formed in 2004 by members Richard Sparber; "IRA Resources Inc., FBO [for the benefit of] Richard J. Annen"[1]; Gary Rudolph; and Rick Seideman.[2] The Operating Agreement states that Hillsborough is a manager-managed limited liability company.

The Operating Agreement provides that "the Company shall be managed by Richard E. Sparber."[3] Although the Operating Agreement includes a number of provisions related to the management of the company, as well as provisions pertaining to the powers of the manager and limitations on the manager's power, the Operating

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1 The Operating Agreement establishes that the " 'member' " is "IRA Resources Inc. FBO Richard J. Annen" and provides the IRA number and its tax identification number, as well. The parties do not raise any issues with respect to the fact that IRA Resources Inc. is the member, acting on Annen's behalf, and both parties appear to treat Annen as the de facto member.

2 The complaint filed in this action alleges that three of the individuals involved in the formation of the company—Sparber, Annen, and Rudolph—are attorneys who practice law in California.

3 Article I, which provides definitions for terms used in the Operating Agreement, defines the term " 'Managers' " in relationship to Sparber as well: " 'Manager(s)' shall mean one or more Persons acting as a Manager. Specifically, 'Manager(s)' shall mean Richard E. Sparber, or any other Persons that succeed(s) him (them) in that capacity."

Agreement does not include any provision that relates to the removal of the manager or the installation of a new manager.[4]

In mid-July 2018, Annen and Rudolph, who together own 53.3 percent of the membership interests in Hillsborough, provided notice to Sparber and Seidman that, pursuant to an act of consent in accordance with Corporations Code section 17704.07, subdivision (c)(5),[5] they were removing Sparber as manager of Hillsborough and installing Annen as the new manager.[6]

On July 31, 2018, Hillsborough, through Sparber, sued all four members of Hillsborough seeking declaratory relief, contending that a unanimous vote of the

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4 We discuss additional aspects of the Operating Agreement in part III of this opinion, *post*.

5 Further statutory references are to the Corporations Code unless otherwise indicated.

6 Specifically, Annen and Rudolph provided the following notice:

> "PLEASE TAKE NOTICE that pursuant to California Corporations Code Section 17704(c)(5), Richard J. Annen and Gary B. Rudolph, who together own 53.2% of the Membership interest in the Company, and thus constitute a majority of the members of the Company, hereby remove Richard E. Sparber as Manager of the Company and select Richard J. Annen as the new Manager effective July 11, 2018."

The relevant document establishing each member's interest share in Hillsborough demonstrates that Annen possesses a 26.7 percent interest, while Rudolph possesses a 26.6 percent interest, making their joint interest in Hillsborough 53.3 percent. It is not clear why the notice they provided regarding removing Sparber as manager indicated that their joint interest equals 53.2 percent.

membership of Hillsborough was required on any matter in which the membership had a right to vote.

Just over a week after filing its complaint, Hillsborough filed an ex parte application for a temporary restraining order and an order to show cause regarding a preliminary injunction, seeking to enjoin Annen from taking any action as Hillsborough's manager.

On August 17, 2018, the trial court issued a minute order in which it granted "Plaintiff's Motion for Temporary Restraining Order and Order to Show Cause Re: Preliminary Injunction."

On August 31, 2018, the trial court issued a more formal document, titled "Order After Continued Ex Parte Application for a Temporary Restraining Order and Order to Show Cause Re: Preliminary Injunction." (Some capitalization omitted.) In the August 31 order, the trial court concluded as follows:

> "The Operating Agreement in this case was adopted and has not been amend[ed] prior to adoption of the Revised Uniform Limited Liability Company Act ('RULLCA'). RULLCA provides new default provisions that apply in the absence of the parties' providing otherwise in the operating agreement. The Operating Agreement does not contain a procedure for appointment or removal of a manager; thus, Corporations Code section 17704.07 provides the procedure. However, the Operating Agreement provides [that a] unanimous vote is required, not a majority, for all matters in which a vote or consent is required. Applying the policy to 'give maximum effect to the principles of freedom of contract and to the enforceability of operating agreements,' the procedure in Corporations Code section 17704.07 is limited by the Members' specific agreement to require unanimous consent on all matters that require consent or a vote. (Corp. Code, § 17701.07; Plaintiff's Ex. 2, § 4.5.)"

Th trial court thereafter issued its order granting Hillsborough a preliminary injunction preventing Annen from "representing [that] he is the properly elected, approved and/or appointed by consent Manager of Hillsborough" and restraining him "from taking any actions as Hillsborough's claimed Manager." The court further enjoined Annen from "enforcing any agreements, short form trust deeds and assignments of rents, and/or other instruments executed," and determined that certain previously signed "Short Form Deeds of Trust and Assignments of Rent" were "null and void."

Annen filed a timely notice of appeal from the court's order granting the preliminary injunction.

III.

DISCUSSION

Annen appeals from the trial court's order granting a preliminary injunction in favor of Hillsborough, through Sparber. According to Annen, the trial court erred in concluding that a provision in the Operating Agreement requires a unanimous vote of all four members of Hillsborough in any circumstance in which a vote of the membership is required, even if the vote at issue is required by a provision of law, rather than by the Operating Agreement itself. Annen maintains that in the absence of a provision in the Operating Agreement governing the removal of the manager, the applicable statutory provision applies, and thus, a vote of the majority of the members is what is required to remove a manager.

A. *Applicable legal standards*

The general purpose of a preliminary injunction is to preserve the status quo pending a determination on the merits of the action. (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528.) A decision granting or denying a preliminary injunction is not an adjudication of the ultimate rights in controversy, but instead merely reflects a determination by the court, based on a balancing of the equities involved, whether the nonmoving party should be restrained from taking certain action. (*Ibid.*) In making such a determination, a trial court must weigh (1) the likelihood that the plaintiff will prevail on the merits at trial and (2) the relative interim harms to the parties from granting or denying injunctive relief. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109 (*Gallo*); *Butt v. State of California* (1992) 4 Cal.4th 668, 677–678.) The "[p]laintiff carries the burden of proof and persuasion on these issues." (*Drakes Bay Oyster Co. v. California Coastal Com*. (2016) 4 Cal.App.5th 1165, 1172 (*Drakes Bay*).)

Ordinarily, on appeal, we review an order granting a preliminary injunction for an abuse of discretion. (*Gallo*, *supra*, 14 Cal.4th at p. 1136.) "[T]he restrained party need only show that the trial court abused its discretion as to one of the two factors." (*County of Kern v. T.C.E.F., Inc*. (2016) 246 Cal.App.4th 301, 317 (*County of Kern*).) The granting of a preliminary injunction without the requisite showing of a likelihood of success on the merits is an abuse of discretion and will be reversed. (*Aiuto v. City & County of San Francisco* (2011) 201 Cal.App.4th 1347, 1355.) Further, "when the likelihood of prevailing on the merits depends on a question of law, an appellate court independently decides that question of law and, thus, whether there was a possibility of

the moving party succeeding on the merits. (*Ibid.*)" (*County of Kern, supra*, at p. 317.) This is because "questions *underlying* the preliminary injunction are reviewed under the appropriate standard of review. Thus, for example, issues of fact are subject to review under the substantial evidence standard; issues of pure law are subject to independent review." (*Gallo*, *supra*, at pp. 1136–1137, italics added.)

The questions raised in this appeal require that we consider and interpret a contract (i.e., the Operating Agreement), as well as relevant statutes governing limited liability companies. Issues of contract and statutory interpretation are subject to our independent review where no factual conflicts exist. (See, e.g., *Kennedy v. Kennedy* (2015) 235 Cal.App.4th 1474, 1480 (*Kennedy*) [where issue involves question of statutory interpretation applied to undisputed facts, appellate court exercises independent review]; *Hass v. RhodyCo Productions* (2018) 26 Cal.App.5th 11, 23 [interpretation of a contract is normally a legal question, where no conflicting parol evidence has been introduced].)

To the extent that resolution of this appeal requires interpretation of the Operating Agreement, we keep in mind certain basic rules regarding the interpretation of contracts. " ' " 'Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. [Citation.] Such intent is to be inferred, if possible, solely from the written provisions of the contract. [Citation.] The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage" [citation], controls judicial interpretation. [Citation.]' . . . " [Citation.]' [Citation.]" (*TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40

Cal.4th 19, 27.) "Contradictory or inconsistent provisions of a contract are to be reconciled by interpreting the language in such a manner that will give effect to the entire contract." (*Estate of Petersen* (1994) 28 Cal.App.4th 1742, 1753, fn. 4; see Civ. Code, § 1652.)

Similarly, to the extent that resolution of this appeal requires the interpretation and application of statutory provisions, we apply general rules of statutory interpretation. "The goal of statutory construction is to ascertain and effectuate the intent of the Legislature. [Citation.] Often, the words of the statute provide the most reliable indication of legislative intent. [Citation.] However, when the statutory language is itself ambiguous, we must examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes. [Citation.] ' "When the language is susceptible of more than one reasonable interpretation . . . we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." ' [Citation.]" (*Rothschild v. Tyco Internat*. (US), Inc. (2000) 83 Cal.App.4th 488, 496.)

B. *Analysis*

Hillsborough was formed as a limited liability company, pursuant to statute. Specifically, in 1994, the Legislature enacted the Beverly-Killea Limited Liability Company Act (the BKLLCA), which was largely codified in former sections 17000 et seq. of the Corporations Code. (Stats. 1994, ch. 1200 (S.B. 469), § 27, eff. Sept. 30,

1994; see *CB Richard Ellis, Inc. v. Terra Nostra Consultants* (2014) 230 Cal.App.4th 405, 411, fn. 4 (*CB Richard Ellis, Inc.*)) These provisions comprehensively governed the affairs of limited liability companies, including their creation and dissolution. (See *Kennedy, supra*, 235 Cal.App.4th at p. 1485, citing *Nicholas Laboratories, LLC v. Chen* (2011) 199 Cal.App.4th 1240, 1252 and *People v. Pacific Landmark, LLC* (2005) 129 Cal.App.4th 1203, 1211–1212.)

In 2012, the BKLLCA was replaced by the California Revised Uniform Limited Liability Company Act (the CRULLCA). (Stats. 2012, ch. 419, §§ 1–32; see *CB Richard Ellis, Inc.*, *supra*, 230 Cal.App.4th at p. 411, fn. 4.) The CRULLCA enacted new Corporations Code title 2.6, which consists of sections 17701.01 et seq. (*Kennedy, supra*, 235 Cal.App.4th at pp. 1485–1486.)

The relevant statutory scheme governing the affairs of limited liability companies serves as a set of default rules to be applied where the parties have otherwise failed to address a particular matter in their operating agreement. (§ 17701.10, subd. (b) ["To the extent the operating agreement does not otherwise provide for a matter . . . , this title governs the matter"].)

It is undisputed that the Operating Agreement is silent on the issue of removing a manager. The Operating Agreement specifically names Sparber as the manager, but it includes no provision regarding how Hillsborough's members are to go about removing

the manager or even replacing him in the event that such a need were to arise.[7] Nor does the Operating Agreement include a process whereby the members could select a manager in the first place. Instead of providing a *procedure* for selecting a "manager," the Operating Agreement states only that the "Company shall be managed by Richard E. Sparber." Given the absence of any provision discussing either the selection or removal of a manager, the Operating Agreement provides no insight into the parties' intentions with respect to the procedure for selecting or removing Hillsborough's manager.

Because the Operating Agreement does not require a vote with respect to the removal of a manager, the parties appear to realize that they must look outside the provisions of the Operating Agreement for a process that will govern the removal of Hillsborough's manager. The parties also appear to agree that the court should look to the comprehensive statutory framework governing the affairs of limited liability companies to determine the relevant process to remove a manager of a limited liability company. We agree with this assessment, given that, with certain limited exceptions, the CRULLCA sets forth default rules that govern the affairs of a limited liability company

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[7] The Operating Agreement does appear to contemplate that at some point, Sparber might not serve as Hillsborough's manager. Specifically, in Article I, which provides definitions for a variety of terms that are used throughout the Operating Agreement, the term " 'Manager(s)' " is defined in the following manner: " 'Manager(s)' shall mean one or more Persons acting as a Manager. Specifically, 'Manager(s)' shall mean Richard E. Sparber, or any other Persons that succeed(s) him (them) in that capacity." The reference to someone "succeed[ing]" Sparber indicates that the parties did foresee the possibility that Sparber might not serve as Hillsborough's manager for the entire life of the corporation.

"[t]o the extent the operating agreement does not otherwise provide for a matter." (§ 17701.10, subd. (b).)[8]

As is relevant here, section 17704.07, subdivision (c) provides that a certain set of "rules apply" in a "manager-managed limited liability company."[9] Included in the list of rules that apply to a "manager-managed limited liability company," is the rule set forth in subdivision (c)(5), which includes the process by which a manager may be "chosen," as well as the process by which a manager may be "removed." (§ 17704.07, subd. (c)(5).) That rule provides, "A manager may be chosen at any time by the consent of a majority

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8 The parties in this case originally argued that the provisions of the CRULLCA applied, and the trial court proceeded under the assumption that the framework provided by the CRULLCA applied to the parties' dispute. However, after the trial court issued its ruling on the temporary restraining order, Annen sent a letter to the trial court raising the issue of whether Annen had applied the wrong statutory scheme in addressing the court's concerns regarding the issues at hand, and raising the question whether the current or former statutory framework governing limited liability companies should apply to the questions raised by Hillsborough's request for an injunction This court does not have a record as to how or even whether the trial court may have addressed this issue, but Annen again raises the question of which statutory framework should be applied to the questions at hand. However, the parties appear to agree that under either the former or current statutory framework, the result should be the same in this case, although they disagree as to what that result should be.

Our review of the relevant provisions leads us to conclude, as the parties have apparently concluded, that we need not decide whether to rely on the provisions of the CRULLCA or the BKLLCA, because under either statutory framework, we would reach the same result in this case. Given that both parties have considered and applied the CRULLCA, and given that we have reviewed the relevant statutes and have concluded that there is no meaningful distinction between the two statutory frameworks that would affect the outcome in this case, for ease of discussion we consider the specific language of the CRULLCA as relevant for purposes of this appeal. However, we will also note the relevant parallel provision of the BKLLCA for purposes of comparison.

9 Slightly different rules apply in a *member*-managed limited liability company. (See § 17704.07, subd. (b).)

of the members and remains a manager until a successor has been chosen, unless the manager at an earlier time resigns, is removed, or dies, or, in the case of a manager that is not an individual, terminates. *A manager may be removed at any time by the consent of a majority of the members without cause*, subject to the rights, if any, of the manager under any service contract with the limited liability company." (*Ibid.*, italics added.)[10] The CRULLCA defines the term " '[m]ajority of the members' " to mean "more than 50 percent of the membership interests of members in current profits of the limited liability company" (§ 17701.02, subd. (m)) unless the relevant operating agreement defines it differently.

Because the Operating Agreement "does not otherwise provide for [the] matter" (§ 17701.10, subd. (b)) of removing a manager, it is clear that the relevant CRULLCA rule, provided for in section 17704.07, subdivision (c)(5), governs the parties' conduct with respect to removing a manager. Hillsborough argues, however, that a provision from the "Voting Rights" section of the Operating Agreement also applies, and that it should be applied together with the requirements of section 17704.07, subdivision (c)(5), to require the consent of *all* of the members of Hillsborough before the manager may be removed. Specifically, Hillsborough contends that an affirmative vote of all four

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10 The relevant provision in the BKLLCA regarding the rule for removing a manager is as follows: "Any or all managers may be removed, with or without cause, *by the vote of a majority in interest of the members* at a meeting called expressly for that purpose." (§ 17152, subd. (b), italics added.) Thus, the BKLLCA, like the CRULLCA, contemplates the removal of a manager by a majority in interest of the members of a corporation.

members is required to remove the manager pursuant to section 4.5 of Article IV (Article IV is titled "Members") of the Operating Agreement. This provision states: "Except as otherwise specifically provided herein, in all matters in which a vote, approval or consent of the Members is required, a vote, consent or approval of all the Members (or, in instances in which there are defaulting or remaining Members, the vote of all non-defaulting or remaining Members) shall be required to authorize or approve such act."

Annen, on the other hand, contends that the terms of the statute are clear and unambiguous, and that section 17704.07, subdivision (c)(5) sets forth the rule that *must* apply to any limited liability company that is manager-managed. According to Annen, the parties may not deviate from the statute in their contract, except to the extent that they may define the phrase " 'majority of members' " differently from the way it is defined in the statutory scheme.

Annen's contention that parties may not contractually deviate from the rule provided in section 17704.07, subdivision (c)(5) conflicts with the language of section 17701.10, which addresses the scope and limitations of operating agreements. Section 17701.10 states in relevant part:

> "Except as otherwise provided in this section, the operating agreement governs all of the following:
>
> "(1) *Relations among the members as members and between the members and the limited liability company*.
>
> "(2) The rights and duties under this title of a person in the capacity of manager.
>
> "(3) The activities of the limited liability company and the conduct of those activities.

> "(4) The means and conditions for amending the operating agreement." (Italics added.)

It is only "[t]o the extent that operating agreement does not otherwise provide for a matter" that the CRULLCA's statutory provisions are to be utilized to govern "the matter." (§ 17701.10, subd. (b).)

Section 17701.10 also provides an exhaustive list of things that an "operating agreement shall not do," thereby specifying only a certain number of matters about which an operating agreement may not deviate from the statutory rules provided in the CRULLCA. Nowhere in that list is there any restriction with respect to altering the requirements of section 11704.07, subdivision (c).[11] Given that section 17701.10 sets no limitation on altering any of the rules set forth in section 17704.07, subdivision (c), that it otherwise allows the parties' operating agreement to govern their relations, and that it states that the rules provided in the CRULLCA apply only to the extent that an operating agreement otherwise does not provide for a matter, Annen's contention that the parties could not have contractually deviated from section 17704.07, subdivision (c)(5)'s rule is without merit.

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11 In contrast, section 17701.10 sets limitations on varying other subdivisions of section 17704.07. For example, section 17701.10 requires that the provisions of "subdivisions (f) to (r), inclusive, and (u) to (w), inclusive, of Section 17704.07" may be varied only through a "written operating agreement," and further prohibits "[v]ary[ing] any of the provisions of subdivisions (s) and (t) of Section 17704.07." (§ 17701.10, subds. (d), (d)(4).)

However, the question remains whether the terms of the Operating Agreement reflect the parties' specific intention to deviate from the majority vote rule provided in section 17704.07, subdivision (c)(5) and instead to apply the unanimity requirement in the "Voting Rights" provision in the Operating Agreement to any process for removing the manager, as Hillsborough argues. On this point, we conclude that Hillsborough has not met its burden of demonstrating a probability of prevailing on the merits.

Specifically, our review of the Operating Agreement and the record, which contains scant extrinsic evidence as to the parties' intentions in creating the Operating Agreement, demonstrates that the Operating Agreement is ambiguous with respect to the question at hand. Such ambiguity, in the absence of extrinsic evidence to support Hillsborough's interpretation, is insufficient to demonstrate a probability of prevailing for purposes of obtaining a preliminary injunction.

According to Hillsborough, the court should interpret the Operating Agreement, which is silent on the issue of removing a manager, in a manner that would give that manager complete control over whether he remains as the company's manager. Hillsborough concedes that the silence of the Operating Agreement on a process for removing a manager requires that the parties look to section 17704.07, subdivision (c)(5), which allows for a manager's removal by the consent of a majority of members, but asserts that the "Voting Rights" provision in the Operating Agreement should operate to alter the default rule provided by statute to require the consent of "all of the Members" of Hillsborough.

We are not persuaded that this is the most reasonable interpretation of the Operating Agreement. As Annen points out, such an interpretation fails to "reconcile the majority vote requirement of Section 17704.07(c)(5) with the unanimous voting provision in Respondent's Operating Agreement" and give effect to both provisions. In our view, the Operating Agreement may reasonably be read in a manner that gives effect to the "Voting Rights" section but also requires the application of the majority consent rule provided in section 17704.07, subdivision (c). Specifically, the terms of the "Voting Rights" section of the Operating Agreement may be reasonably interpreted as referring only to those voting rights that are bestowed on members *by the Operating Agreement itself*. The Operating Agreement requires unanimous consent of the members *not* with respect to "all matters" generally, but with respect to "all matters in which a vote, approval or consent of the Members is required." The Operating Agreement requires a vote of the members in at least three circumstances, but otherwise allows for virtually all other business decisions to be handled by Hillsborough's manager. For example, the Operating Agreement requires unanimous consent before any member is "required or permitted to make any additional capital contributions to the Company. It also grants "all remaining [m]embers" the right to approve the terms by which a member "may withdraw or resign as a Member from the Company." A third provision in the Operating Agreement sets forth four circumstances in which the manager "shall not have authority hereunder to cause the Company to engage" without "first obtaining the affirmative vote or written consent of all the Members," three of which are selling all or substantially all of the company's assets, merging the company with another limited liability company or

partnership, or merging the company with a corporation or general partnership, and the last of which is "[a]ny other transaction described in this Agreement as requiring the vote, consent, or approval of the Members."

Further, the CRULLCA's default rule regarding the removal of a manager does not contemplate simply that consent to the removal be obtained *generall*y. Rather, the CRULLCA specifies that the removal of a manager may occur specifically "by the consent *of a majority of the members.*" (§ 17704.7, subd. (c)(5).) The extent of the consent of the members that is required by the default rule is defined in the rule itself—i.e., the consent required by the statutory rules is that of a *majority* of the members. It would make little sense to import only a portion of the relevant rule (i.e., "consent"), as Hillsborough urges, rather than the entire rule (i.e., the "consent of a majority"), particularly where, as here, the Operating Agreement is silent on the matter, and the "Voting Rights" rule in the Operating Agreement can be reasonably understood as referring only to matters in which the right to vote or give consent derives from authority granted to the members by the Operating Agreement itself. This is particularly true given that the "Voting Rights" provision does not imply or suggest that it is intended to apply to procedures and rules imported from outside of the Operating Agreement.

As noted, the statutory rules are intended to provide a default set of rules that are to apply to govern the affairs of a company where the parties have failed to provide for how certain matters should be handled. Here, the parties failed to provide a process in their Operating Agreement for the removal of a manager. It is more reasonable that the default rule, in its entirety, would apply where the parties have not otherwise provided for

a procedure in their Operating Agreement and have not *specifically and expressly agreed to deviate from the default rule*. Further, an interpretation of the Operating Agreement's "Voting Rights" provision as requiring a unanimous vote only for those matters for which the Operating Agreement grants the members the right to vote would avoid an illogical result. Under Hillsborough's theory, in any situation in which the members other than the member who is serving as the manager become unhappy with the manager's performance, those other members would have to obtain the consent of that manager, himself, in order to remove him as manager. However, if the manager agreed to be removed as manager, that person could simply withdraw as manager, and there would be no need for a removal process at all. Such an illogical consequence is not one that we can infer the members of Hillsborough intended when they adopted the "Voting Rights" provision in the Operating Agreement. This becomes even less likely given that there is no indication that the parties ever contemplated any process by which to remove and replace the manager of the company.[12] It would thus appear that a reasonable reading of the "Voting Rights"

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12 At one point in the respondent's brief, Hillsborough briefly suggests that Annen "could have proceeded under Corporations Code section 17706.02 to have Sparber disassociated as Member," and acknowledges that Annen "would have had to disassociate both Sparber and Seideman, to have the two of four member vote qualify pursuant to [the "Voting Rights" provision in the Operating Agreement]." Hillsborough is referring to a provision in the CRULLCA titled "Events Causing Dissociation," which lists twelve possible events that, upon their occurrence, would result in the dissociation of a member from a limited liability company. (See § 17706.02.)

Hillsborough does not explain how Annen could have utilized any of the "events" identified in section 17706.02 to "have Sparber [or Seideman] disassociated as Member[s]," and our review of these "events" suggests that none of the circumstances identified in section 17706.02 would have applied in the scenario presented here. The only subdivision that we can identify to which Hillsborough may have intended to refer

provision of the Operating Agreement is that it imposes a unanimity requirement only with respect to those provisions in the Operating Agreement, itself, that specifically require the vote, approval or consent of the members. For the reasons stated above, such an interpretation appears to be the *more* reasonable interpretation of the terms of the Operating Agreement.

Given that Hillsborough is the party that sought a preliminary injunction, Hillsborough bore the burden of proof and persuasion as to its likelihood of succeeding on the merits—i.e., of demonstrating that the parties intended the "Voting Rights" section of the Operating Agreement to effectively grant Sparber the power to determine whether he should be replaced as manager of Hillsborough. (See *Drakes Bay*, *supra*, 4 Cal.App.5th at pp. 1171–1172 [plaintiff seeking preliminary injunction bears burden of proof and persuasion on the two interrelated factors of likelihood plaintiff will prevail on the merits and the interim harm to plaintiff or defendant should court deny or grant the preliminary injunction].) Because the "Voting Rights" provision of the Operating Agreement is ambiguous and the more reasonable interpretation of the provision is that it was intended to require unanimity only in the matters for which the membership was granted the right to vote by the Operating Agreement itself, and because there is an

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to in suggesting that Annen could have caused Sparber to be dissociated would be subdivision (c), which provides for dissociation when a member "is expelled as a member pursuant to the operating agreement." (§17706.02, subd. (c).) However, Hillsborough cites to no portion of the parties' Operating Agreement that contains a procedure for expelling a member, and we have found none. It is thus entirely unclear to this court how Annen could have "proceeded under Corporations Code section 17706.02 to have Sparber disassociated as Member," as Hillsborough suggests, without running into the same issue posed in the present case.

absence of parol evidence to indicate that the parties intended otherwise with respect to the ambiguous Operating Agreement (see, e.g., *Riverisland Cold Storage, Inc. v. Fresno–Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1174 [extrinsic evidence admissible to explain or interpret ambiguous language]), at this point in the litigation, Hillsborough has not demonstrated a sufficient likelihood of prevailing to overcome the harm that would come from preventing Annen from acting as manager.[13]

We therefore conclude that the trial court erred in granting the preliminary injunction enjoining Annen from representing himself to be, or acting as, Hillborough's manager on the ground that a unanimous vote of all four members of Hillsborough is required in order to remove Hillsborough's manager.

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13 It is possible that, at trial, the parties may submit extrinsic evidence that would assist the trial court in interpreting the meaning of the "Voting Rights" provision in the Operating Agreement; our decision with respect to the court's order granting a preliminary injunction is in no way intended to prevent the parties from fully litigating in the trial court the interpretation of the Operating Agreement and its interaction with CRUCLLA.

IV.

DISPOSITION

The order of the trial court granting a preliminary injunction in favor of respondent Hillsborough is reversed. The case is remanded for further proceedings. Appellant is entitled to costs on appeal.

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.